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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL HENDERSON, Defendant and Appellant.	A123553 (Alameda County Super. Ct. No. 153430)

Defendant Michael Henderson was convicted by a jury of attempted premeditated murder, assault with a firearm, and mayhem. He appeals, arguing that there was insufficient evidence of premeditation. He also argues that the security fee imposed as part of his sentence must be reduced. The Attorney General concedes the latter point and we therefore shall remand for correction of the judgment but otherwise shall affirm.

BACKGROUND

Sidney Joseph testified that he had known defendant since 2004, when they met through mutual friends. In 2004 they saw each other "every day" around the intersection of 90th Street and MacArthur Boulevard in Oakland. Joseph knew defendant as "Mike." In September 2004, the two men had an argument after someone told Joseph that defendant had made an unfavorable statement about him. Joseph approached defendant at a Mexican restaurant, tried to grab him, and the two wrestled and threw punches at each other. The fight moved outside of the restaurant and was broken up by others. Joseph felt that he lost the fight. Joseph saw defendant the next day but they did not interact.

Joseph next saw defendant in February 2006, again near the intersection of 90th Street and MacArthur Boulevard. Defendant was in a car and Joseph was standing on the sidewalk. Defendant drove past and made eye contact with Joseph but did not stop. After that, Joseph saw defendant almost every day near the same intersection, though the men did not talk to each other.

On the afternoon of April 13, 2006, Joseph was at the corner of 90th and MacArthur with his friend Antwan, speaking with another friend, Eric. Defendant approached the men and stopped approximately five feet from them. Defendant said, "What's up, Joe-Joe," which is Joseph's nickname. Defendant's tone of voice suggested he was "trying to start something, like a argument," and he was "gritting his teeth, grinding his teeth real hard." Joseph responded, "What do you mean, what's up?" and defendant started "nodding his head and he had his hand in his pocket, like fidgeting, reaching for something, trying to pull out something." Defendant pulled a black revolver from his right pocket. Joseph turned and ran. Joseph saw defendant "lift it up to start opening fire." He heard two or three gunshots. After the second shot, he felt a pain in his stomach, side and back and lost feeling in his legs. He fell to the ground. He saw Mike running across the street.

Officer Carletta Garrett testified that she was on patrol on April 13, 2006 when she was called to 90th Street and MacArthur Boulevard. When she arrived she saw a crowd and Joseph lying on the ground. She talked to him, and he told her that "Mike" shot him. Joseph was surprised that defendant shot him because "I knew we had problems, but I didn't know it had got that far, that he had that feeling toward me to want to walk up to pull out a gun to shoot me." Joseph identified defendant in a photo lineup as the person who shot him.

Defendant was arrested when he appeared in court to be sentenced on another matter. After he was arrested, Sergeant Rebecca Campbell interviewed him. Campbell told him that she was investigating a shooting that occurred on April 13 around 3:30 p.m. near 90th and MacArthur and asked defendant, "[D]id you do this?" Defendant said he did not and told Campbell that he was in Fairfield on that day. Campbell then showed

defendant a video tape of the incident the police had obtained from a surveillance camera at a smoke shop at the corner of 90th Street and MacArthur Boulevard. The tape showed that defendant was present that day.

Defendant testified that he knew Joseph but that they were never friends. He testified that in 2004 he was eating in a restaurant when Joseph entered and "was talking about something I said something about him and he started taking a nasty attitude with me. So I stood up." Joseph then hit him in the face. The altercation ended outside the restaurant when others broke it up. Defendant felt that he "got the better outcome of the situation" and that he had no reason to seek revenge. Defendant saw Joseph the next day but nothing happened.

On April 13, 2006, defendant's sister dropped him off at 89th and Hillside, about two blocks from 90th and MacArthur, to meet some friends. After visiting with his friends, defendant walked towards 90th and MacArthur where he was expecting to meet his sister. Defendant had not spoken with Joseph and did not know he was going to be at the intersection. He testified that, "As I was walking up 90th towards MacArthur, I seen someone walking towards me. . . . Me and the person who was walking towards me was five steps away, and then the person stops and he turns around." Defendant did not know the man. He had on a yellow shirt and was bald. When the man turned, he walked around the corner of 90th and MacArthur. Defendant heard gunshots and then saw the man run towards 94th. Defendant testified that he then rounded the corner and that is when his image was captured on the videotape. He ran when he heard the shots and did not see who had been shot. He called his sister to ask her to pick him up at 88th and MacArthur.

Defendant denied that he was carrying a gun on April 13. Rather, he stated that he was holding a "beanie" hat in his hand, which is what was seen on the videotape. He testified that when he told Campbell he was in Fairfield, "I was trying to say I was on my way to Fairfield, but it slipped out the wrong way."

Defendant was charged by information with one count of attempted premeditated murder (Pen. Code,[1] §§ 187, subd. (a), 664, subd. (f)) with an allegation that he caused great bodily injury, personally discharged a firearm causing great bodily injury within the meaning of sections 12022.7, subdivision (a) and 12022.53, subdivisions (b), (c) and (d), and that the offense was committed while defendant was on bail within the meaning of section 12022.1. The second count charged defendant with assault with a firearm (§ 245, subd. (a)(2), with the same allegations, and the third count charged defendant with mayhem (§ 203) with the same great bodily injury allegations and the allegation that the crime was committed while defendant was on bail.

A jury found defendant guilty of all of the counts and found the enhancement allegations to be true. The court sentenced defendant to 25 years to life imprisonment for the attempted murder, a consecutive 25 years to life for use of a firearm, plus an additional two years for the on-bail enhancement. The court stayed imposition of sentence for the remaining enhancements on the first count pursuant to section 654. Pursuant to section 654, the court also stayed sentences of four years for the assault with a firearm, a consecutive five-year term for the great bodily injury enhancement, a consecutive 10-year term for use of a firearm, and, on the mayhem conviction, the aggravated term of eight years, plus a consecutive 25 years to life for the use of a firearm enhancement.[2] The court also imposed a security fee of $180.

DISCUSSION

On appeal, defendant argues that there was insufficient evidence that the attempted murder was premeditated. "In reviewing appellant's insufficiency of evidence argument, we ask not whether there is evidence from which the trier of fact could have reached some other conclusion, but whether, viewing the evidence in the light most favorable to respondent, and presuming in support of the judgment the existence of every fact the trier reasonably could deduce from the evidence, there is substantial evidence of appellant's

[1] All statutory references are to the Penal Code.

[2] The record on appeal does not include a complete abstract of judgment, but includes only the portion reflecting the sentence on the first count.

guilt, i.e., evidence that is credible and of solid value, from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. Thus, our sole function as a reviewing court in determining the sufficiency of the evidence is to determine if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*In re Michael M.* (2001) 86 Cal.App.4th 718, 726, fn. omitted.)

"An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse. [Citations.] However, the requisite reflection need not span a specific or extended period of time. ' " ' Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.' " ' " (*People v. Stitely* (2005) 35 Cal.4th 514, 543.) "The type of evidence which this court has found sufficient to sustain a finding of premeditation and deliberation falls into three basic categories: (1) facts about how and what defendant did prior to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing—what may be characterized as 'planning' activity; (2) facts about the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]; (3) facts about the nature of the killing from which the jury could infer that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2)." (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27.) "The *Anderson* factors, while helpful for purposes of review, are not a sine qua non to finding first degree premeditated murder, nor are they exclusive." (*People v. Perez* (1992) 2 Cal.4th 1117, 1125.)

In this case, there was evidence of planning in that defendant, armed with a loaded gun, arrived on a street corner where he knew Joseph was often present. "That defendant

armed himself prior to the attack 'supports the inference that he planned a violent encounter.' " (*People v. Elliot* (2005) 37 Cal.4th 453, 471.) Defendant argues that his possession of a gun that day was not evidence of planning because there was no evidence that he knew that Joseph would be present when he arrived on the street corner. However, Joseph testified that he had seen defendant at that street corner "every day almost" since February 2006, which supports the inference that defendant expected Joseph to be there on the day in question. Defendant attempts to distinguish *People v. Elliot* because in that case the defendant had spent the day lying in wait for the victim and had talked to others about obtaining a new knife before the attack. However, in *People v. Marks* (2003) 31 Cal.4th 197, on which the court in *Elliot* relied, the evidence of planning was that the defendant "brought a gun rather than money with which to pay for the taxi ride." (*Id*. at p. 230.) Although the evidence of planning was stronger in *Elliot*, the evidence here was sufficient to support the inference that defendant came to the 90th Street and MacArthur intersection carrying a gun, anticipating that he would see Joseph that afternoon.

The manner of the shooting also provides evidence that supports a finding of premeditation. Joseph testified that defendant spoke to him "like [he was] trying to start something, like an argument," and was "grinding his teeth real hard." According to the evidence, Joseph did nothing to provoke the shooting. "The lack of provocation by the victim leads to an inference that an attack was the result of a deliberate plan." (*People v. Miranda* (1987) 44 Cal.3d 57, 87, disapproved on other grounds by *People v. Marshall* (1990) 50 Cal.3d 907, 933.) Defendant argues that Joseph's "sarcastic response to [defendant's] greeting" was sufficient to provoke an unplanned attack. Although a jury might have so interpreted the evidence, the jury also could reasonably have found that defendant's manner and the minimal interaction between the men prior to the shooting indicated that defendant had come to the corner with the premeditated intention of killing Joseph.

Moreover, there was also evidence that Joseph had previously instigated a fight with defendant, which might have provided defendant with a motive. The Attorney General cites *People v. Hyde* (1985) 166 Cal.App.3d 463, 478 for the proposition that

revenge is a sufficient motive to support a finding of premeditation. Defendant argues that in that case "the defendant spent weeks pursuing his victim in every conceivable way, and after the killing, took every opportunity to describe his satisfaction with his revenge." While the circumstances in the present case undoubtedly are less extreme, and the evidence of a revenge motive less compelling, nevertheless there was sufficient evidence to support an inference that defendant remained angry about the fight that Joseph had started two years before. Although both men testified that defendant got the better of Joseph in the fight, there was a history of animosity between the two men that could have provided a motive for the shooting.

In short, although the evidence might well have supported a contrary finding, it was nonetheless sufficient to support the finding that the jury did make, that defendant deliberately and with premeditation shot and attempted to kill Joseph.

Defendant points out that the court imposed a security fee of $180, or $60 per conviction. As the Attorney General acknowledges, at the time of sentencing the statutory fee was only $20 per conviction. (§ 1465.8, subd. (a)(1).) The erroneous imposition of a fine is an error that is "so obvious and so easily fixable that correction of these errors in the absence of an objection at sentencing will not unduly burden the courts or the parties." (*People v. Smith* (2001) 24 Cal.4th 849, 854.) The appropriate aggregate fee is $60, and the judgment should be modified to so indicate.

DISPOSITION

The matter is remanded for correction of the abstract of judgment to reflect the correct amount of the security fee. In all other respects the judgment is affirmed.

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Pollak, J.

We concur:

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McGuiness, P. J.

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Siggins, J.